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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

In re JOSHUA D., a Minor.	C076119
MEGAN A., Petitioner and Appellant, v. JOSEPH D., Objector and Respondent.	(Super. Ct. No. 169239)

This case involves repetitive petitions by Megan A. (Megan), the mother of Joshua D. (Joshua), seeking to terminate biological father Joseph D.'s (Joseph) paternal rights. The petition giving rise to this appeal was based on Family Code sections 7826 and 7827,[1] authorizing termination of parental rights based on mental incapacity. The trial

[1] Further undesignated statutory references are to the Family Code.

court granted Joseph's motion to strike this (second) petition because, less than two months prior to the filing of the second petition, the court had denied Megan's (first) petition to terminate Joseph's paternal rights under section 7825 due to his criminal record.

The trial court based its order striking the second petition on the grounds of claim preclusion (res judicata), but also observed that no change of circumstances was alleged since the first petition. We ordered supplemental briefing on the question of whether the trial court's order was supportable based on the lack of alleged changed circumstances between the two petitions.

We now conclude that the lack of changed circumstances compelled the decision that Joshua's primary right to have a father who is fit to parent him had already been decided under the legal theory that Joseph was unfit due to his criminal record. Thus the immediate relitigation of Joseph's fitness to parent, under the specific circumstances that presented themselves here, was barred by the doctrine of res judicata. In effect, as we will describe, having lost on her proffered theory of criminality, Megan seized on the trial court's stray observation about Joseph's alleged mental condition and the fact that it had not been alleged as a separate legal theory for terminating his paternal rights. She then treated the observation as an invitation to seek reconsideration of the order denying her first petition by filing a second petition, basing it on the same essential facts known to her all along. Although this was an understandable litigation tactic, given Megan's goal of terminating Joseph's parental rights, the second petition improperly sought relitigation of the same primary right under a different theory.

Accordingly, we shall affirm the order striking Megan's second petition.

BACKGROUND

In an unpublished decision, we affirmed Joseph's convictions for crimes committed in February 2007. These crimes included attempted kidnapping and assault with a deadly weapon, committed against a woman with whom defendant allegedly

became infatuated, and who allegedly had warned Megan--then pregnant with Joshua--about Joseph.[2] Megan married Joseph in July 2009, while he was still in prison. The marriage was dissolved in 2010, and Megan was given full legal and physical custody of Joshua, who had been born in July 2007.

On August 20, 2012, after our decision on Joseph's appeal had become final, and in response to Joseph's petition to modify visitation, Megan filed her first petition to terminate Joseph's paternal rights. This petition was filed in the dissolution case. It begins by stating it was brought pursuant to section "7800 et seq." Later it specifies it was based on Joseph's criminal record, citing section 7825, although it also alleged Joseph's conduct after his convictions demonstrated "his continuing severe mental health problems, mental instability, and general unfitness to have custody and control of the child now and at any time in the future." Joseph, represented by the Shasta County Public Defender, opposed the petition.

On February 6, 2013, a court-appointed investigator filed a report providing a summary of the circumstances of the parties and their relationship, few of which are relevant here.[3] We note that the report discusses Joseph's mental state, including his purported statements to the investigator, and summarizes reports from the criminal case. The investigator concluded the crimes "appear to clearly show the probability that [Joseph] will fail to discharge parental duties . . . to a substantial degree. This does not appear to be a risk worth taking."

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[2] We do not cite our decision, to protect Joshua's privacy, as he shares Joseph's surname.

[3] Megan's briefs recite purported facts from this report that were not found true by the trial court. We disregard this recitation, as well as her references to documents in the record filed *after* the challenged order.

Megan's trial brief relied on Joseph's criminal convictions to seek termination of his paternal rights, and emphasized the sentencing court's findings that Joseph was armed with a knife during the crimes, stabbed the victim, acted with a high degree of cruelty, the crimes evidenced planning and sophistication (involving Joseph's possession of binding devices possibly also useable as torture devices), and that Joseph's violent conduct meant he represented a danger to society.

The trial court denied Megan's first petition in a written ruling dated June 14, 2013, finding Megan had not met her burden of proof by clear and convincing evidence to show a nexus between Joseph's criminal convictions and his parenting ability. (See *In re Baby Girl M*. (2006) 135 Cal.App.4th 1528; *In re Terry E*. (1986) 180 Cal.App.3d 932.) The ruling notes Joseph "has been diagnosed with depression and other mental issues but the court would point out that this was not a motion to terminate parental rights pursuant to Family Code § 7827."[4]

On August 6, 2013, Megan filed her second petition to terminate Joseph's paternal rights in the dissolution case. It was based on sections 7826 and 7827, alleging Joseph's mental condition rendered him unfit to parent. On September 23, 2013, Joseph moved to strike the second petition based on res judicata, characterizing the trial court's June 14, 2013, order as a final judgment.[5] The motion asserted claim preclusion, emphasizing that Megan sought the same relief in both petitions--termination of Joseph's paternal rights--

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[4] No transcript of the contested trial was provided.

[5] Megan does not contest that by the time the trial court made its January 2014 ruling striking the second petition, the time in which to appeal from the June 2013 order denying the first petition had passed and that order had become final. (See *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174 ["the finality required to invoke the preclusive bar of res judicata is not achieved until an appeal from the trial court judgment has been exhausted"]; *Sharon v. Hill* (C.C.D.Cal.1885) 26 Fed. 337, 345-347 [discussing California law]; Code Civ. Proc., § 1049.)

and argued this meant she sought to vindicate the same primary right. In opposition to the motion to strike, Megan argued in part that the primary right belonged to Joshua, and was the right to be parented by fit parents, and that Megan was merely "one of the people authorized . . . to bring forward a petition to terminate parental rights." By Joseph's logic, Megan argued, even if he abandoned or cruelly treated Joshua his paternal rights could not be severed.

In the reply to Megan's opposition, Joseph in part belatedly added the argument that issue preclusion (collateral estoppel) barred Megan's claim.

On January 29, 2014, the trial court found claim preclusion barred the instant petition, and observed that no change of circumstances since the prior petition was alleged. Accordingly, the motion to strike was granted.

Megan timely filed her notice of appeal.[6]

DISCUSSION

The proponent of claim or issue preclusion bears the burden to show the elements have been met, specifically, that the primary right or litigated issues are the same in the current and prior matters. (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [collateral estoppel]; *Vella v. Hudgins* (1977) 20 Cal.3d 251, 257 [res judicata].)

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6 The parties do not dispute the appealability of the order, and we assume Megan is sufficiently aggrieved to appeal therefrom. We note, however, that the authority she cites addresses the appealability of an order *granting* termination of parental rights (§ 7894; *Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1007, fn. 1), not an order *denying* termination, or, as here, *striking* a petition to terminate parental rights. And, contrary to her view, section 7805, subdivision (b) merely addresses the confidentiality of records on appeal from orders "under this part" and does not of itself authorize appeals from particular orders. Despite the lack of pertinent authority as required in the opening brief (Cal. Rules of Court, rule 8.204(2)(B)), we shall assume the order is appealable.

"The doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 334, p. 938.)

The Family Code provides six separate statutory bases--or *legal theories*--for terminating parental rights outside of the dependency context, as follows: (1) abandonment (§ 7822); (2) child neglect or cruelty (§ 7823); (3) disability due to alcohol or drugs, or moral depravity (§ 7824); (4) conviction of crimes "of such a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child" (§ 7825); (5) developmental disability or mental illness (§ 7826); and (6) "mental incapacity or disorder" making the parent unable to care for the child (§ 7827). However, as we explain immediately *post*, these separate statutory bases do not provide six separate *causes of action* or *primary rights* whether retained by Megan as Joshua's mother, or by Joshua himself.

Under California's primary rights theory, "there is only a single cause of action for the invasion of one primary right. In determining the primary right . . . , 'the significant factor . . . is the harm suffered.' " (*Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 904, disapproved on another point, *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 72.) The availability of separate remedies or the application of different legal theories will not establish different causes of actions or primary rights. (See *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 898, 904.) " ' "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." ' " (*Id*. at p. 897.) " '[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." ' " (*Id*. at p. 904; see *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795 [same].)

Accepting Megan's view that Joshua is the possessor of the primary right at issue, the suggested primary right is Joshua's primary right to safe parenting. That right is not divisible into six separate rights, that is, the right to be free of a parent who has abandoned him, a separate right to be free of a parent who will likely harm him due to criminality, a separate right to be free of a parent who will likely expose him to moral depravity, etc. Nothing prevented Megan from pursuing on Joshua's behalf all tenable legal theories for terminating Joseph's paternal rights in the first petition; the only *new* event between them was that she failed to persuade the trial court to grant the first petition. If a litigant were permitted to file a subsequent petition based on a different legal theory extant at the time the previous petition was filed, each time one theory was unsuccessful, presumably six successive petitions could be prepared and filed seriatim. Because such petitions stay all other proceedings (see § 7807), this would allow trifling with the courts and dilatory pleadings, and would serve no legitimate purpose.

In assessing the purpose of a pleading, such as Megan's second petition, we look to its form, not its caption. (See *Stiger v. Flippin* (2011) 201 Cal.App.4th 646, 654; *Rivas v. Safety-Kleen Corp.* (2002) 98 Cal.App.4th 218, 229; *Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 546-547.) Putting aside the 10-day time limit generally applicable to reconsideration motions (see Code Civ. Proc., § 1008), Joseph's mental state and the corresponding legal theory relating to his fitness was not unknown to Megan at the time she filed her first petition. "If counsel need not explain the failure to earlier produce pertinent legal authority that was available, the ability of a party to obtain reconsideration would expand in inverse relationship to the competence of counsel. Without a diligence requirement the number of times a court could be required to reconsider its prior orders would be limited only by the ability of counsel to belatedly conjure a legal theory different from those previously rejected, which is not much of a limitation." (*Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199; see *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468.)

Thus, whether couched as an effort to split a cause of action (Joshua's primary right to be rid of an unfit parent), or as an improper effort to seek reconsideration, Megan's second petition was defective, and therefore the trial court properly struck it.

Contrary to Megan's view, our conclusion does not forfeit Joshua's rights to bring a future motion to terminate Joseph's paternal rights. If new facts arise, Megan could file a new petition because those new facts would create a new violation (or "count") of the same primary right (whether vested in the parent or child). For example, if Joseph succumbed to drug addiction, or moral depravity, he would not be immune from a subsequent petition on those grounds. Nor would he be immune from a subsequent petition based on criminality, if he commits subsequent criminal acts impacting his ability to parent. But in *this* case, in the time period between *these* two petitions, Megan alleged no new facts that created a new cause of action.[7]

DISPOSITION

The order striking the petition to terminate paternal rights is affirmed. Megan shall pay Joseph's costs of this appeal. (See Cal. Rules of Court, rule 8.278.)

DUARTE, J.

We concur:

MAURO, Acting P. J.

HOCH, J.

[7] To the extent Megan suggests the "best interests of the child" standard should allow an exemption from the normal primary rights analysis, her argument raises a public policy question more properly addressed "on the other side of Tenth Street, in the halls of the Legislature." (*Osborn v. Hertz Corp.* (1988) 205 Cal.App.3d 703, 710.)